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No. 91-1139

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

FRANKLIN SAVINGS ASSOCIATION and
FRANKLIN SAVINGS CORPORATION,
Petitioners,

v.

DIRECTOR, OFFICE OF THRIFT SUPERVISION, and
THE UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The question presented in this case is whether § 1464 (d)(2)(E) requires that owners of a seized savings and loan be given an opportunity to present evidence opposing the seizure in their action before the district court. The petition demonstrates that this is a question of national importance, one that has already generated substantial confusion in the courts and that is bound to recur frequently.

In opposing certiorari, respondents primarily offer distractions [1] and say little to deny the importance of the issue presented. They claim that they are likely to seize "only" 79 institutions "in the foreseeable future." Opp. 8 n.3. But more recent statements of regulators double the predicted number.[2] And even if the correct number were closer to 79, respondents ignore the fact that the

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[1] Respondents' brief is replete with euphemisms: Respondents redesignate ordinary, regularly-scheduled examinations of banking operations as "informal adjudication" (Opp. 11), they refer to the Director's perfunctory issuance of his seizure "opinion" as "formal findings" (Opp. 7), and they quote the wholly unsupported and inappropriate libel which the Tenth Circuit adopted wholesale from the OTS's brief below (Opp. 3). This last is particularly unseemly.

Respondents repeat OTS's disingenuous assertion—made for the first time in the appellate stages of these proceedings—that Franklin was a " 'high-flying, debt-laden troubled savings and loan,' in which the owners were 'diverting millions of dollars into their pockets . . . notwithstanding the losses being incurred by the association.' " (Opp. 3, quoting Pet. App. 40a.) While this Court might be reluctant to grant review of a case involving a truly mismanaged thrift, this is not that case. As petitioners noted (Pet. 11), the district judge, who listened to the opinions of experts and observed the testimony of Franklin's managers and owners, concluded that this was "not a case involving an infamous or notorious savings and loan" and was "not a case involving fraud, corruption or self-dealing by the management or directors of Franklin. There has been no allegation or even hint of illegal or unethical conduct."

[2] Knight & Schmidt, *U.S. Shifts Bank, S&L Strategies*, Washington Post, Dec. 8, 1991, at A-22.

Tenth Circuit's decision is equally applicable to the seizures of commercial banks.[3] See Pet. 29; Brief of American Banking Association, et al., as *amici curiae*, at 2 (explaining that 12 U.S.C. § 1821(c)(7) contains language identical in relevant respects to § 1464(d)(2)(E)). In short, respondents cannot credibly argue that the process for adjudicating challenges in the district courts to ex parte seizures of banks and savings and loans is not a question of pressing national importance.

Respondents oppose certiorari chiefly on two other grounds, neither of which is reason to deny the petition. First, respondents argue that the confusion in the circuits is not sufficient to justify this Court's review. (Opp. 9 n.4.) Although, as petitioners demonstrate below, respondents have overstated the degree of harmony in the lower courts, the dispositive point here is that there is no need for the Court to await an outright circuit conflict on an issue of immediate and pressing importance. Second, respondents offer various arguments to the effect that the Tenth Circuit's decision is correct on the merits. (Opp. 12-14.) None of these arguments, which are in any event better directed to briefing on the merits, provides a persuasive basis for denying certiorari.

1. Respondents suggest that this Court's review is unnecessary because the Tenth Circuit's construction of Section 1464(d)(2)(E) is consistent with that of two other courts of appeals. Opp. 9 & n.4 (quoting *Woods* v. *FHLBB*, 826 F.2d 1400 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988) and *Guaranty Sav. & Loan Ass'n* v. *FHLBB*, 794 F.2d 1339 (8th Cir. 1986)). But a review of the facts in those cases, which respondents neglect entirely, demonstrates that neither court adopted the extreme interpretation advanced by the Tenth Circuit. In *Woods*, the court of appeals observed that (1) the Board had conducted a hearing on a cease and desist order at

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[3] Knight & Schmidt, at A-1 ("The FDIC is predicting the failure of at least 200 banks with $86 billion in assets for 1992").

which the management of the thrift had a full and fair opportunity to present its case; (2) the Board also placed before the district court "the entire administrative record" and the owners were afforded the opportunity in the district court to submit "a multi-volume exhibit and affidavits in opposition to the Bank Board's position"; and (3) the institution had ample notice that the Board was considering a conservatorship. See 826 F.2d at 1412-13. Respondents' interpretation of § 1464(d)(2)(E) would require none of these elements, even though the *Woods* court found them dispositive of the institution's due process claims. *Id.* Franklin certainly had none of these opportunities or any such notice prior to its seizure.

Similarly, respondents quote but then ignore the *holding* in *Guaranty Savings*, which is merely that de novo review is not appropriate. But that is a red herring. Petitioners did not request a de novo hearing. What they requested was a meaningful opportunity to be heard at a meaningful time as to the inaccuracies in the designated record. The Director had not afforded them that opportunity and therefore they asked for it before the district court. Nothing in *Guaranty* remotely supports the extreme holding of the Tenth Circuit.

Moreover, the confusion among the district courts described in the petition is not dispelled by respondents' observations about who won or lost the cases. (Opp. 9 n.4.) The fact is that courts have followed diverse procedures in adjudicating actions brought under § 1464(d)(2)(E) (Pet. 15-17). And courts continue to declare that respondents' interpretation of § 1464(d)(2)(E) abrogates due process principles. *Marietta Franklin Sec. Co.* v. *Muldoon*, 770 F. Supp. 1212, 1220-21 (S.D. Ohio 1991) (concluding after review of the cases interpreting § 1464(d)(2)(E) that the parties should be allowed to supplement the Director's record). Whether a majority of courts ultimately rejected the financial institutions' challenges is irrelevant to the issue presented here—how

to interpret § 1464(d)(2)(E) in light of the requirements of due process.

2. The plain language of § 1464(d)(2)(E) will not support respondents' repeated attempts to characterize the district court's task as traditional "judicial review" of administrative decisionmaking. Congress did not put the word "review" in § 1464(d)(2)(E); instead, it states that owners of a seized financial institution may bring "an *action* in the United States district court" against the OTS and "the court shall *upon the merits* dismiss such action or direct the Director to remove [the] conservator or receiver." (Emphasis added.)

Nor, obviously, are respondents correct in asserting that § 1464(d)(2)(E) is entirely silent as to the standards to be used or the procedures to be employed. (Opp. 11.) For this reason, § 1464(d)(2)(E) does not fall within the rule of *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963). That rule states that "in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no *de novo* proceedings may be held." Here, however, Congress has specified a procedure (an "action") to be commenced in a particular forum, the district court, whose adjudication is to focus "upon the merits."

Moreover, the *Carlo Bianchi* line of cases itself reveals that the rule advanced is not applicable here. None of the statutes at issue in these cases contains provisions which match § 1464(d)(2)(E) in specificity. See *Carlo Bianchi*, 373 U.S. at 710 n.1 (statute provides only that agency decisions on government contracts shall be final unless arbitrary, capricious, fraudulent or unsupported by substantial evidence); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 405 n.3 (1971) (statute contained no provision for judicial review, so the Court applied APA review procedures); *Camp* v. *Pitts*, 411 U.S. 138, 139-140 (1973) (same). Cf. *Chandler* v.

Roudebush, 425 U.S. 840, 862 n.37 (1976) ("where Congress intends review to be confined to the administrative record, it so indicates").

Respondents agree with petitioners that "upon the merits" means that the district court's decision should be "based upon the merits of the action (i.e. whether statutory grounds for [appointment] exist)." (Opp. 10, Pet. 18.) The fact that the statute does not "specifically define the scope of review" (Opp. 6) is not a license for the government to rewrite the statute to provide for "on the record" review of the Director's selected supporting documents. Given the lack of any meaningful due process protection prior to the seizure, fundamental principles of due process require that § 1464(d)(2)(E) be construed to permit the district court to hear management's side of the case.

3. Respondents also err in their claim that "on the record" review in the district court constitutes all the process that was due to petitioners. Respondents offer that "Franklin had numerous opportunities to present its views and these views were considered by Director" (Opp. 13, quoting Pet. App. 17a) and that these proceedings "involv[ed] informal adjudication." *Id.* at 11. In fact, no adjudication, informal or otherwise, took place before OTS.

Petitioners were subjected to regular examinations by OTS officials. During these examinations ordinary inquiries were made by examiners into various financial operations. The individuals answering had no knowledge that a record was being made, much less that the agency was contemplating use of the most extreme sanction within its power—the seizure of the institution's assets.[4] Petitioners had no meaningful opportunity to present evi-

[4] Although respondents maintain that the designated record " 'contains voluminous data' that reflected the extensive submissions Franklin Savings made to the OTS" (Opp. 13, quoting Pet. App. 17a), it is noteworthy that prior to the district court hearing, OTS

dence to the Director that their conduct conformed completely with generally accepted accounting principles, that they satisfied all capital requirements, and that they were operating in a safe and sound fashion.[5] Respondents' characterization of its routine examinations as "informal adjudication" is therefore gross hyperbole. The fact remains that, under respondents' interpretation of § 1464 (d)(2)(E), there is absolutely no reliable check against mistaken decisions to appoint conservators or receivers.

The "action" in district court is the first and only opportunity for an institution to present its case in defense. The due process principles at work here are simple: (1) the less predeprivation process available, the greater the process that must be afforded post-deprivation, see *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 545 (1985); and (2) the greater the private interest affected, the greater the risk of erroneous deprivation; and (3) the more substantial the government's interest, the more extended the process must be. See *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976). The Tenth Circuit, however, has narrowed that process to nothing more than a review of what is, in effect, the Director's brief and appendices. It suffices under the statute, according to the court of appeals, for the agency to include in the designated record "summaries" or "recitations" of what-

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submitted an additional 17 volumes of "designated record," a clear indication that even OTS recognized that the "designated record" was not sufficient to withstand scrutiny. The district court refused its admission. *See Franklin Sav. Ass'n* v. *Director*, 740 F. Supp. 1535 (D. Kan. 1990).

[5] Indeed, respondents' labelling of Franklin as "financially distressed" (Opp. 2) is deceptive. Franklin always exceeded every regulatory capital requirement, as illustrated in each of its publicly filed statements (forms 10Q and 10K) and the district court's findings. Pet. 6-7. The district court also found that Franklin has an economic value of $378 million, which was not less than its GAAP capital and that Franklin continued to earn a profit and was likely to continue to do so in the future. Pet. App. 104a-105a.

ever submissions the institution's owners may have made that may be contrary to the agency's position. Pet. App. 17a. This Court's holdings as to what constitutes a "meaningful opportunity" to respond to adverse governmental action demonstrate that such perfunctory review is inadequate. See *Brock* v. *Roadway Express, Inc.*, 481 U.S. 252, 261 (1987) (meaningful opportunity to respond requires an opportunity to present oral and written responses, including affidavits and supporting documents); *Arnett* v. *Kennedy*, 416 U.S. 134, 170 (1974) (opinion of Powell, J.) (right to be heard includes right to submit evidence).

Respondents further attempt to distract this Court from the due process concerns raised by the Tenth Circuit's interpretation of § 1464(d)(2)(E) by repeatedly claiming that the district court acted excessively by conducting an extended trial in this case (Opp. 8, 12, 14).[6] But even if that argument is accepted, it provides no basis for concluding, like the court of appeals, that *no*

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[6] Respondents make a related claim that after an 18-day trial, "the district court basically made its own findings [and] compared those to the findings of the Director." (Opp. 12, quoting Pet. App. 19a.) A review of the district court's opinion reveals something different. The district judge, deferring to the administrative expertise of OTS, presumed the correctness of OTS's conclusions and received evidence in rebuttal. Pet. App. 48a. Finding the presumption rebutted, the district court had no obligation to accept the Director's findings. *See Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (notwithstanding deference, "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made"). "Deference" does not mean wholesale acceptance. *See id.* And, even if there were independent findings, the Tenth Circuit affirmed the district court's crucial finding on the central issue in dispute during the 18-day proceeding, whether Franklin's accounting standards comported with GAAP. Pet. App. 37a-38a.

proceedings need be conducted by a district court even though there has never been an opportunity for any kind of hearing before the OTS. A supposed *excess* of process by the district court does not resolve the question as to whether the Tenth Circuit's process meets *minimum* requirements.

4. The court of appeals reasoned that its extremely limited interpretation of § 1464(d)(2)(E) was permissible under due process principles because a challenging party could invoke three exceptions to persuade the district court to go beyond the record. Pet. App. 13a. These exceptions obtain where: (1) the factors considered by the agency are not apparent from the record; (2) the record does not disclose whether the agency considered evidence contrary to its own position; and (3) more information is needed so that the district court can understand a technical or complex subject matter. Respondents err, for at least two reasons, in relying upon the court of appeals' purported exceptions.

First, the existence of these exceptions presumes that an adequate record has been compiled in the first place. In each of the cases relied upon by the Tenth Circuit and respondents (Pet. App. 13a, Opp. 12), the agency held predeprivation proceedings directed at the ultimate question before the agency and compiled a record containing the concerned parties' own arguments and submissions. See *Thompson* v. *United States Dep't of Labor*, 885 F.2d 551, 555-56 (9th Cir. 1989) (describing proceedings before the ALJ and review by the Secretary); *Animal Defense Counsel* v. *Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988) (administrative record was "fully developed and open for public comment" prior to agency's decision), *corrected*, 867 F.2d 1244 (9th Cir. 1989).

Under respondents' construction of § 1464(d)(2)(E), however, no such administrative record is compiled on the ultimate question of whether a receiver or conservator should be appointed for a financial institution. OTS

simply gathers information during its regularly scheduled examinations from parties unaware of OTS's ultimate intent—a far cry from the compilation of a traditional judicial or administrative record.

Second, respondents' attempt to borrow the exceptions set forth in *Thompson* and *Animal Defense Counsel* is a make-weight argument in this case. Respondents' simply ignore petitioners' point (Pet. 25 n.20) that the Tenth Circuit's holding in this case itself proves that the exceptions as understood by the court of appeals are inadequate to provide due process. The Tenth Circuit, hewing to a designated record despite numerous examples of missing contrary evidence and much confusion over complicated accounting methods, held that none of the exceptions was applicable.[7] If the exceptions did not authorize judicial proceedings beyond the designated record here, they are meaningless.

* * * *

In this case, the district court and the court of appeals employed widely divergent procedures, reflecting two distinct and widely followed interpretations of § 1464(d)

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[7] Notably, the district court specifically held, as an alternative ruling, that each of the three grounds for going beyond an administrative record was satisfied. Pet. App. 52a-53a. First, the district court found that the factors considered by the agency (which as stated by the Director, were nothing more than a paraphrase of statutory language) were not apparent from the record. Pet. App. 52a-53a. Missing from the record, for example, were notes or memoranda memorializing critical conferenecs and meetings. *See* Pet. 53a n.5. Second, the court found that the Director had not considered all relevant information; his staff had deliberately concealed a material statement made by Franklin's bond trustee on the eve of appointment to the effect that defeasance was not threatened with respect to Franklin's bonds. Pet. App. 74a-75a. Finally, the district court judge called for expert accounting testimony to clarify the dispute over accounting practices that was at the heart of OTS's claim that Franklin failed to meet its capital requirements. Pet. App. 54a. The court of appeals simply ignored all of this and limited its review to the designated record, even though all the parts of that record relevant to the agency action were proven false in the district court hearing.

(2)(E), in adjudicating petitioners' challenge to the OTS's appointment of a conservator. These courts reached diametrically opposite results. This case thus squarely presents an issue that is both timely and national in scope, and one whose resolution will affect not only savings and loans, but the entire commercial banking industry as well.

Respondents' arguments in opposition reveal an agency's efforts to consolidate fully the overwhelming authority that it has crafted for itself through litigation, despite plain statutory language which creates a substantial check upon that authority. The unfortunate advent of a savings and loan crisis in this nation has placed a heavy burden upon regulators, but the atmosphere of crisis only heightens the need for this Court to establish now some uniform treatment of actions filed under § 1464 (d)(2)(E) and statutes like it, and to protect the due process rights of the owners and stockholders of seized financial institutions.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

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AMICUS CURIAE

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BRIEF OF NATIONAL BANKERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the scope of review under 12 U.S.C. § 1464(d)(2)(E), which provides for an "action" in district court to determine "upon the merits" the legality of a government seizure of a savings and loan institution, can be limited consistent with the commands of the statute and the Due Process Clause to documents designated for the record by the government, thereby precluding the district court from considering:

(a) any evidence submitted by the savings and loan's representatives, even though there was no prior opportunity to submit evidence concerning the grounds for the seizure because it was *ex parte* and without notice or prior proceeding; or

(b) the whole administrative record in existence at the time of the seizure.

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BRIEF OF NATIONAL BANKERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The National Bankers Association ("NBA"), founded in 1927 as the National Negro Bankers Association, is the trade association of the nation's 106 minority and women-owned banks. Our members include banks owned by Asians, American and East Indians, African Americans, Hispanics, and Women. They service, in the aggregate, over one million depositors. These banks are lo-

cated primarily in urban areas, and provide the primary source of job creation and entrepreneurial capital for small businesses in minority communities.

In the decision below, the United States Court of Appeals for the Tenth Circuit concluded that a court reviewing the lawfulness of the government's decision to seize a savings and loan institution under 12 U.S.C. § 1464 (d)(2)(E), which requires that such a determination be made in "an action . . . upon the merits," is confined to considering only the evidence designated by the government agency and may not consider other evidence submitted by the institution—even when that evidence was also part of the administrative record before the agency. The parallel statute authorizing challenges to government seizures of commercial banks, 12 U.S.C. § 1821(c)(7), contains identical "upon the merits" language, and the decision below therefore has far-reaching consequences not only for savings and loan institutions but for commercial banks as well.

That decision renders meaningless the judicial review procedures that Congress established, and the Constitution requires, for the seizure of savings and loan institutions and commercial banks. The NBA is gravely concerned that the decision leaves such institutions with no effective protection against arbitrary agency action, and that it will have a particularly harmful effect on NBA member banks, whose access to capital will be severely inhibited by the uncertainty and added risk the decision generates for them and their investors.[1]

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of this Court.

REASONS FOR GRANTING THE PETITION

The facts surrounding this case are fully set forth in the petition for certiorari, and *amicus* will not restate them in detail. On February 15, 1990, the Director of the Office of Thrift Supervision ("OTS") seized Franklin Savings Association ("Franklin") without giving it prior notice or the opportunity for a hearing of any kind. Franklin then filed this action in United States District Court seeking judicial review of the seizure, as the governing statute authorizes, "upon the merits." 12 U.S.C. § 1464(d)(2)(E). The district court concluded (Pet. App. 51a) that it was obligated to consider as evidence not only the specific documents submitted to it by OTS, but other exhibits and testimony relevant to the merits of the OTS decision as well. After considering such evidence, the court held (*id.* at 115a) that the agency had acted arbitrarily, capriciously, and without factual basis.

The court of appeals reversed. The court concluded that because "it is essential the director act promptly in appointing a conservator once he is of the opinion that a statutory ground exists," any subsequent judicial proceeding should be governed by "a narrow and limited scope of review." *Id.* at 12a. It therefore held that the only review that the statute (or the Constitution) requires is to determine whether the Director's "opinion"—which the court of appeals defined as "a belief held with confidence, not substantiated by direct proof or knowledge"—was rational. *Id.* at 12a, 38a. The court of appeals further held that a court reviewing a seizure decision is permitted to consider only the information reviewed by the Director in forming his opinion, *id.* at 17a-18a, and that the decision as to what information the Director must consider in forming his opinion is "left to his discretion." *Id.* at 16a. Because the district court had considered other evidence in addition to the evidence

designated by the Director, the court of appeals held that it had exceeded its authority.

The decision of the court of appeals poses a serious threat to the nation's financial institutions. The court held that the government may seize such an institution without ever being required to confront evidence contrary to its position as long as the agency failed or declined to consider that evidence in the first instance. This decision is contrary to both the statute it purports to construe and the due process clause of the United States Constitution. Moreover, it places savings and loan institutions and commercial banks in a highly precarious posture by exposing them to the potential for arbitrary seizure with no possibility of effective review. It thus introduces into the industry a substantial degree of uncertainty and risk, which will seriously inhibit investment—particularly investment in those smaller, less established institutions that principally serve minority communities in urban areas.

1. The court of appeals manifestly misconstrued the intent of Congress, which expressly required that subsequent review of a seizure decision be "upon the merits." The governing statute provides:

> If, in the opinion of the Director, a ground for the appointment of a conservator or receiver for a savings association exists, the Director is authorized to appoint ex parte and without notice a conservator or receiver for the savings association. In the event of such appointment, the association may, within 30 days thereafter, bring an action in the United States district court . . . for an order requiring the Director to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Director to remove such conservator or receiver.

12 U.S.C. § 1464(d)(2)(E). In authorizing the government to order immediate seizures without notice or hearing, while providing for after-the-fact judicial review on

the merits, Congress sought to effectuate two goals. It protected depositors by providing authority for swift and immediate action when their assets are at risk, and it safeguarded the due process rights of the institution by requiring subsequent and meaningful judicial review. Those objectives are not in conflict. Indeed, they are complementary; it is precisely *because* of the perceived need for the government to have the authority to take instant, *ex parte* action without any pre-seizure process that Congress established the right to post-seizure review on the merits.

The court of appeals, however, assumed that Congress' decision to authorize an initial seizure at the agency's broad discretion—based simply on an agency official's "opinion"—somehow applied to the post-seizure review process as well. It therefore held that, even after the institution has been seized, the court's task is simply to review the information relied upon by the Director to determine whether his opinion had a rational basis. Because the Director's determination of what information to rely upon is, under this decision, both left to his discretion and dispositive of the court's own scope of review, that standard inevitably guarantees that the Director's decision will be sustained.

This is a perverse misreading of the statute. The need for quick action in appointing a conservator was believed to justify aggressive and unilateral powers of seizure in the first instance. The agency is thus authorized to act immediately in order to protect depositors from the dissipation of their assets. These seizure provisions are constitutionally permissible, however, only because the institution is guaranteed full judicial review afterwards—at a time when, since a conservator has been appointed and is managing the institution, the "emergency" situation no longer exists.

The court of appeals thus erred in concluding that the need for the agency to take immediate action, and the

broad power given it to effect a seizure whenever the Director forms the requisite opinion, provides a basis for limiting the process granted the institution in the subsequent judicial proceeding. Exactly the opposite is the case. The potential for arbitrary agency action and erroneous seizures based upon misinformation is substantially heightened by the sweeping authority given the Director. The Director's power to seize institutions without notice is a basis not for truncating subsequent procedures, but rather for ensuring that the institution's right to meaningful judicial review is fully protected once the conservator is in place. That is why Congress balanced the grant of authority to make initial seizures, which is accomplished with virtually no procedural or substantive checks, with a post-seizure review "upon the merits" in a federal district court capable of making independent factual findings. For the court to hold that the absence of process *before* the seizure mandates a similar deprivation *after* the seizure is to turn the statute, and the due process clause, on their heads.

2. The judicial procedure established by the court of appeals for the seizure of financial institutions is not only contrary to the statute and the Constitution; it is also unprecedented in administrative and regulatory law. It is fundamental that when an individual or an institution is deprived by the government of property, it must be given the opportunity at *some* stage to present relevant evidence to demonstrate that the seizure is unlawful and to have that evidence considered. That opportunity may be given pre-seizure or post-seizure, but it must be granted in some form at some time.

In most agency adjudications, for example, a party is notified of the specific claims against it and permitted to submit evidence to the agency in response prior to the agency's decision. That party generally has no right to submit new factual evidence to the court of appeals on review, but the evidence it submits to the agency is

part of the record on appeal. If the agency has ignored relevant record evidence or responded insufficiently to that evidence, the court of appeals will order a remand so that the evidence may be given appropriate consideration.

Under the decision in this case, however, a financial institution is never given the opportunity to present evidence in its defense. It has no such opportunity when the matter is before the agency, because it is not given prior notice of the seizure and the claimed statutory grounds—it learns of the seizure only when the seizure takes place. And the institution has no such opportunity when the matter is before the district court, because the district court is then limited to reviewing only that portion of the record on which the agency states it relied.[2]

The term "administrative record" is thus a misnomer here. There is no "administrative record" because there have been no administrative proceedings to record. The "administrative record" in this case, which is typical of these cases generally, consisted of internal agency memoranda justifying the seizure, the institution's public filings, examination reports, and materials provided by the institution's accountants. It did not contain evidence from Franklin rebutting the Director's contention that specified statutory grounds existed to justify a seizure, because no such contention had been advanced at the time these documents were created. But see *Fuentes* v. *Shevin*, 407 U.S. 67, 81 (1972) ("No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him

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[2] Nor does the agency have any obligation to consider any particular evidence before it, because "the decision of the director as to which information he must review to make an appointment decision should be left to his discretion." Pet. App. 16a. That discretion, in turn, is binding upon the court as well, because it is forbidden from going beyond the "administrative record"—defined as "the information *that* [*the director*] *relied upon in making his decision*." *Id.* at 18a (emphasis in original).

and [an] opportunity to meet it") (quoting *Joint Anti-Fascist Refugee Comm'n* v. *McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)). Even if such documents could have been submitted, the Director could have excluded them from the administrative record transmitted to the court by the simple expedient of not relying upon them.

Accordingly, under the interpretation of the statute set forth by the court of appeals, the institution is given absolutely no opportunity to rebut the charges against it. A statute should generally be construed, where fairly possible, so as to be constitutional. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). The court of appeals in this case, however, misconstrued the statute in such a way as to render it unconstitutional—and then upheld it.

3. In his opposition to the petition, the Director appears to concede that the institution must at some point be given the opportunity to submit evidence rebutting the Director's charges and defending its position. Opp. 13. He notes, however, that the court of appeals stated as an exception to its holding that additional evidence could be submitted to the district court where necessary to determine "whether the agency considered all relevant factors including evidence contrary to the agency's position," (Pet. App. 13a), and contends that the court simply concluded that the three-volume record in this case was sufficiently "voluminous" to reflect adequately Franklin's position. *Id.* at 17a. The Director argues, therefore, that this case presents only the factbound question of whether it was necessary to go beyond the agency-designated record in this particular instance.

This argument is disingenuous. The issue in this case is whether an institution can be seized without ever being given the opportunity to present a legal or factual case rebutting the stated grounds for the seizure. Frank-

lin never had that opportunity at the administrative level because it was never given notice of the seizure. The routine filings it made prior to the seizure do not suffice because they were not directed to rebutting what ultimately became the agency's position. For a court to review the portions of the record designated by the Director and decide that, in *its* view, Franklin's position was nonetheless adequately represented is offensive to the adversarial system and to the constitutional guarantee of due process.

Moreover, such a statement is absurd on its face. In this case, the additional evidence the district court considered convinced it that the Director had acted arbitrarily and capriciously and had not properly considered the evidence contrary to his position. That evidence included both portions of the administrative record that the Director had not designated and evidence that had never been submitted to the agency. The court of appeals never held that the district court's factual findings were clearly erroneous; it held instead that the district court had improperly defined the scope of its review. This was a case, therefore, in which going beyond the agency-designated record *did* demonstrate that the agency had failed to consider properly "all relevant factors including evidence contrary to the agency's position," Pet. App. 13a, but the court of appeals held that the additional evidence should never have been considered. The court's purported exception to its rule confining review to the agency-designated record is therefore completely illusory. If such evidence was inadmissible in this case, it is impossible to imagine what hypothetical the court of appeals could have had in mind in suggesting that the admission of such evidence would in some instance be proper.

There is therefore nothing "factbound" about the legal issue presented by the petition. It will always be the case that the evidence an institution submits once it is informed of the seizure and the grounds therefor will be

different from the material it has submitted previously. Sometimes, as apparently happened here, that evidence will demonstrate that a mistake was made. The holding below establishes that such evidence may be—indeed, must be—ignored whenever the court determines on its own review of the agency-designated record that the institution's position was adequately represented. That such a determination will virtually always be made is shown both by the court of appeals' own description of the narrowness of this exception (Pet. App. 12a-13a) and by the fact that such a determination was made in this case in the face of the district court's contrary factual findings.

4. The uncertainty created by this decision for financial institutions is compounded by the more general disarray in the federal courts over the rules for review of government seizures. The procedure rejected by the court of appeals in this case, which permits the institution to introduce evidence while requiring it to show that the seizure was arbitrary and capricious, has been expressly adopted by federal courts in Illinois and Ohio. See *Marietta Franklin Sec. Co.* v. *Muldoon*, 770 F. Supp. 1212 (S.D. Ohio 1991); *Collie* v. *FHLBB*, 642 F. Supp. 1147 (N.D. Ill. 1986). Similar procedures have been adopted elsewhere. See *Lincoln Sav. & Loan Ass'n* v. *Wall*, 743 F. Supp. 901 (D.D.C. 1990); *San Marino Sav. & Loan Ass'n* v. *FHLBB*, 605 F. Supp 502 (C.D. Cal. 1984); see also *Washington Fed. Sav. & Loan Ass'n* v. *FHLBB*, 526 F. Supp. 343 (N.D. Ohio 1981). Other courts have gone further, and conducted *de novo* review of the agency decision. See *Telegraph Sav. & Loan Ass'n* v. *FSLIC*, 564 F. Supp. 862 (N.D. Ill. 1981), *aff'd sub. nom. Telegraph Sav. & Loan Ass'n* v. *Schilling*, 703 F.2d 1019 (7th Cir. 1983); *Fidelity Sav. & Loan Ass'n* v. *FHLBB*, 540 F. Supp. 1374 (N.D. Cal.), *rev'd on other grounds*, 689 F.2d 803 (9th Cir. 1982). The Tenth Circuit's approach thus stands at one extreme, but even the

courts that have taken other approaches are not consistent with one another.

Moreover, as the petition demonstrates (Pet. 25), the decision below approving reliance on only agency-designated portions of an administrative record is also in direct conflict with the decisions of numerous federal courts requiring consideration of an administrative record in its entirety. See *Thompson* v. *United States Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989); *Public Power Council* v. *Johnson*, 674 F.2d 791, 794 (9th Cir. 1982); *Dopico* v. *Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982); *Natural Resources Defense Council* v. *Train*, 519 F.2d 287, 291 (D.C. Cir. 1975); *Appalachian Power Co.* v. *EPA*, 477 F.2d 495, 507 (4th Cir. 1973); *Tenneco Oil Co.* v. *Department of Energy*, 475 F. Supp. 299, 317 (D. Del. 1979).

This case thus presents a legal issue which has spawned substantial confusion and disagreement in several reasoned but conflicting opinions, and which is certain to recur as the government carries out its plan to become increasingly aggressive in its seizures. See *infra* p. 12. There is nothing to be gained by allowing the issue to percolate further; to the contrary, there is a powerful and immediate need for the uniform rule that only this Court can provide.

5. The decision below has particularly severe consequences for smaller institutions, such as those which comprise the NBA. When a conservator is appointed to manage a bank, its value drops immediately and its shareholders experience an immediate loss. William Seidman, former Chairman of the FDIC, has estimated that when a bank is closed, the value of its assets usually drops from 10% to 15%.[3] The potential for a government takeover is therefore an extremely important considera-

[3] Seidman, *The Facts About The FDIC*, Wall St. J., June 5, 1991, at A-12.

tion to those who are considering investing in a financial institution.

The Tenth Circuit's decision thus makes it much harder for less established financial institutions that serve minority communities—those with less ready access to capital to begin with—to attract the necessary investment. If an institution can be taken over by the government on the mere basis of an agency official's opinion, with the institution never given a fair opportunity to rebut that opinion, then the possibility of a sudden and permanent diminution in shareholder assets becomes very real. This creates substantial additional uncertainty and risk, and measurably discourages needed investment.

The Director's bland assertion (Opp. 9) that "only" 79 savings associations are likely to be placed in conservatorship or receivership in the near future hardly allays such concerns. In December, 1991, *Washington Post* interviews with the heads of the FDIC, OTS, the Resolution Trust Corporation, and the Office of the Comptroller of the Currency revealed that "[g]overnment regulators are poised to begin the biggest round of bank and savings and loan seizures in U.S. history" as part of a new strategy to "step in more quickly when signs develop that a bank or S&L is in trouble." Knight & Schmidt, *U.S. Shifts Bank, S&L Strategies*, Washington Post, Dec. 8, 1991, at A-1. Public announcements of that sort, coupled with judicial decisions that rob such institutions of the ability effectively to respond, have a considerable chilling effect in the capital markets and render the need for review by this Court especially pressing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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